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March 21, 2016

VIA ECF

Patricia S. Connor
Clerk, United States Court of Appeals
for the Fourth Circuit
Lewis F. Powell, Jr. United States Courthouse Annex
1100 East Main Street, Suite 501
Richmond, VA 23129-3517

RE: *Nestlé-Dreyer's Ice Cream Co. v. NLRB*, Case Nos. 14-2222 & 14-2339

Dear Ms. Connor:

The Eighth Circuit decision recently submitted by the Board, *FedEx Freight, Inc. v. NLRB,* adds nothing to the analysis here because the Eighth Circuit simply sidestepped the controlling authority in this circuit with a superficial distinction. *FedEx* purported to distinguish *NLRB v. Lundy Packing Co., 68 F. 3d. 1577* (4th Cir. 1995) on the ground that the union-proposed unit in *Lundy Packing* initially was presumed to be appropriate. The distinction is unpersuasive because it turns on a point that was not dispositive in *Lundy Packing.* Any careful reading confirms that *Lundy Packing*'s problem with the Board's test was not a presumption in favor of the union-proposed unit. Rather, it was the weight on the scales applied by the "overwhelming" standard—the exact same standard used in *Specialty Healthcare.* Indeed, there is no indication whatsoever in either the Board's or this Court's opinions in *Lundy Packing* that the union's proposed unit somehow lacked a basic community of interest. As a production-and-maintenance unit, it is beyond dispute that the proposed unit in *Lundy Packing* had the basic community of interest that *Specialty Healthcare* requires. Neither the Board nor the Union suggests otherwise. *FedEx*'s sidestepping of *Lundy Packing* ignores the

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heart of the holding and the rationale of this controlling authority, and therefore is entirely unpersuasive. *See also,* Appellant's Reply Brief at pp. 2-7, Dkt. No. 54.

The most notable aspect of the *FedEx* decision is the court's reference to *Odwalla, Inc.,* 357 NLRB No. 132 (2011) as the sole example of a case in which the Board rejected a union's proposed unit under the *Specialty Healthcare* standard. *FedEx* failed, however, to report the other side of the scorecard. Since *Specialty Healthcare*, the Board has rejected employers' challenges and blessed the very unit proposed by a union in 37 of 38 cases. Because unions have won the contested scope-of-the-unit issue over 97% of the time under the *Specialty Healthcare* standard, it is evident that the Board's "overwhelming" standard gives controlling weight to the extent of organization now, just as it did in *Lundy Packing* in 1995. This still violates NLRA Section 9(c)(5).

Sincerely,

s/ Bernard J. Bobber
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CERTIFICATE OF SERVICE

I hereby certify that on March 21, 2016, I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF filing system.

I hereby certify that the foregoing document was served on the counsel of record by using the CM/ECF filing system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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Dated this 21st day of March, 2016.

s/ Bernard J. Bobber
Bernard J. Bobber